Supreme Court of the United States

October Term, 1965

No. 673

MARTHA CARDONA,

Appellant,

against

JAMES M. POWER, THOMAS MALLEE, MAURICE J. O'ROURKE and JOHN R. CREWS, Members of and constituting the Board of Elections of the City of New York,

Appellees,

and

LOUIS H. LEFKOWITZ, as Attorney General, appearing specially pursuant to Section 71 of the Executive Law,

Intervenor-Appellee.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

PAUL O'DWYER,
Attorney for Petitioner-Appellant.

W. BERNARD RICHLAND,
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In this appeal which presents grave constitutional questions affecting the voting rights of hundreds of thousands of New York citizens and upon the resolution of which questions the New York Court of Appeals is sharply divided, intervenor-appellee, the New York Attorney General, has moved to dismiss or affirm upon the assertion that the matter is unworthy of review by this Court.

Apparently uninfluenced by any need for consistency, the New York Attorney General contends on the one hand that New York's literacy-in-English laws are valid and live on the other hand urges that the question presented "may very well be moot" because section 4(e) of the Voting Rights Act of 1965 applies to appellant and renders the New York literacy-in-English laws void as to her.

We shall demonstrate in this brief that the New York Attorney General is wrong upon both counts.

1.

In the face of the rapidly developing state of the law, pointing clearly to the destruction of barriers to the extention of voting rights to all citizens, the New York State Attorney General moves to dismiss or affirm this appeal upon the basis of the arid doctrine of *stare decisis*. The brief which he has submitted here provides a contrast to the policy of our Nation recently expressed by the President.

The President's historic March 15, 1965 Address to Congress states our National purpose and puts this appeal in proper perspective:

> "Those words are a promise to every citizen that he shall share in the dignity of man. This dignity cannot be found in a man's possessions. It cannot be found in his power or in his position. It really rests on his right *to be treated as a man equal in opportunity to all others.*
>
> It says that he shall share in freedom. He shall *choose his leaders,* educate his children, provide for his family according to his ability and his merits as a human being.
>
> To apply any other test, to deny a man his hopes because of his color or *race* or his religion *or the place of his birth* is not only to do injustice, it is to deny America and to dishonor the dead who gave their lives for American freedom.
>
> Our fathers believed that if this noble view of the rights of man was to flourish it must be rooted in democracy. *The most basic right of all was the right to choose your own leaders.*
>
> The history of this country in large measure is the history of expansion of that right to all of our people. Many of the issues of civil rights are very complex and most difficult. But about this there can and should be no argument: *every American citizen must have an equal right to vote.*
>
> There is no reason which can excuse the denial of that right."

Can there be any doubt that it is Appellant's "race" and the "place of [her] birth" which has resulted here in the denial of her right to "share in the dignity of man", to be "treated . . . equally in opportunity to all others", to join with other citizens in the exercise of "the most basic right of all"—"the right to choose [her] leaders", to "share in freedom", and, as "every American citizen, [to] have an equal right to vote"? The question need only be asked to be answered.

2.

The position taken by the New York State Attorney General is founded upon what we must submit is the arrogant notion that English is the *only* American language. Such a notion ignores our Nation's history and is at variance with our National policy. Puerto Rico is as much a part of the territory of the United States as is Wisconsin; Americans born in Puerto Rico are as much native-born American citizens as are Americans born in Indiana. The native language of Puerto Rico—Spanish—is an attribute of the Puerto Rican's race, culture and place of birth in America. To deny to American-born citizens of Puerto Rican origin the "most basic right of all"—the right to vote in elections—solely because, although literate in their own native-American language, they are not literate in the language of other American natives, is, in effect, to condition their right to vote upon their attainment of the culture, race and language of those born in an English-speaking part of the territory of the United States, and to deny them that "exact equality with citizens from the American homeland" to which this Court has held them to be entitled. *Balzac* v. *Porto Rico* 258 U. S. 298, 311.

3.

We have demonstrated in the Jurisdictional Statement submitted to this Court, and the Chief Judge and two of the Judges of the New York Court of Appeals found, that the pattern of laws in New York governing lit-

eracy requirements shows their irrational nature and demonstrates that they have no proper relation to Constitutional voting qualifications. We have shown that the New York Constitution itself establishes exceptions to the literacy test and that the statutes go further and carve out numerous other exceptions, all of which permit persons totally illiterate in *any* language to vote while at the same time denying to petitioner and all other similarly situated literate American-born citizens the right to vote. We have shown moreover that literacy in the English language is not a requisite for the attainment of understanding of political issues and political candidates. We have shown that literacy in the Spanish language is just as effective an accomplishment in this regard. The New York State Attorney General's only answer to this seems to be the flat assertion that pre-1921 illiterates, Armed Forces-veterans illiterates, illiterate relatives of Armed Forces-veterans and persons illiterate by virtue of physical disability are appropriate exceptions to the literacy test requirements, but appellant, literate in Spanish, is not. It is submitted that this assertion finds no support in logic or reason.

4.

We demonstrated in our Jurisdictional Statement (pp. 10-11) that New York's literacy laws irrationally and therefore unconstitutionally discriminate among selected groups of citizens and apply literacy requirements to some and exempt others. We showed that in the classes of thus selected groups *exempt* from the requirement are:

1. Pre-1921 illiterates;

2. Physically disabled illiterates;

3. Honorably discharged veterans;

4. Armed Forces veteran-inmates in Veterans Hospitals;

5. Spouses, parents and children of veterans, whether living or dead, in veterans hospitals; and

6. Spouses, parents and children of the class covered by 5. above, if they are "with such inmates".

Intervenor-appellee New York Attorney General attempts to conjure these circumstances out of existence by the bland, unsupported assertion (Brief, pp. 5-6, 9) that the exemptions are appropriate classifications but fails to suggest the existence of any basis for such classification related to the exercise of the elective franchise; and indeed, as we demonstrated in our Jurisdictional Statement (pp. 10, 11, 12, 15), there is none. He then goes further and, with an appearance of seriousness, suggests that a "conclusive presumption" of literacy in instances 3 to 6 above does not constitute an exemption from the literacy test. It is submitted that we need only state the New York Attorney General's assertion to disprove its validity. See *Wigmore on Evidence* (3 Ed) § 2492.

At the same time that he is asserting the absolute validity of New York State's literacy-in-English requirement, the New York Attorney General also asserts (Br. pp. 11-12) that § 4(e) of the Voting Rights Act of 1965 which exempts from the literacy-in-English requirement of New York law persons educated to the Sixth grade in another language in an American school in Puerto Rico "is in full force and effect" in New York. He then goes on to suggest (Br. p. 12) that therefore the very grave questions presented by this appeal "may very well be moot". This suggestion is without foundation. In the first place, § 4(e) of the Voting Rights Act of 1965 is not "in full force and effect" in New York; it has recently been struck down by a three-Judge Court (*Morgan* v. *Katzenback*, D.C. D. of C. Civ. No. 1915/65, opinion dated November 15, 1965), in a suit in which the New York Attorney General joined in challenging the validity of § 4(e). In

the second place, there is nothing in the record before this Court to indicate that appellees have relented in their refusal to qualify appellant as a voter—as indeed they have not. Thirdly, there is nothing in the record before this Court to indicate that appellant *could* qualify under § 4(e) Voting Rights Act of 1965. Finally, if the New York Attorney General were correct in his unsupported assumption that appellant is entitled to be registered as a voter, then she is entitled to a reversal by this Court. Nor need we stop there: Appellant is here challenging the entire pattern of the New York State literacy-test laws and asks this Court to strike them down in their entirety. Far from this appeal being "moot" it is both live and significant and the New York Attorney General should not be permitted to avoid a review by this Court of the 4 to 3 decision of the New York State Court of Appeals by the transparent device of suggesting, without actually asserting, that this appeal is moot.

5.

Finally, intervenor-appellee the New York Attorney General in an attempt to find support for his position, appends to his brief a 1961 brief of the U. S. Attorney for the Southern District of New York in which a position was taken which contrasts with the position of the Attorney General of the United States as set forth in his extensive brief in the recently decided *Morgan* v. *Katzenbach*, discussed above. *Lassiter* v. *Northampton*, 360 U. S. 45, the principal authority upon which intervenor-appellee relies (Br. pp. 3, 6, 7, 8, 10) is inapplicable here. In the first place *Lassiter* lends no support to the denial of voting rights of a citizen literate in the American language of his American place of birth. In the second place, *Lassiter* is surely no authority for the highly irrational distinctions made in New York's literacy laws between various classes of citizens related in not the slightest degree to their qualification to participate in their government.

Conclusion

This appeal provides an occasion for the recognition that no provision of law which hampers or impedes the exercise of the most basic right of all Americans—the right to be an elector—can or should be allowed to stand. For, as the President said in his address to Congress "It is wrong—deadly wrong—to deny any of your fellow Americans the right to vote in this country."

It is submitted that the disqualification of the perfectly-literate appellant, solely upon the ground that the American language in which she is literate is not the language New York State would choose its voters to be literate in, is at variance with our National purpose; constitutes an invalid burden upon Americans of Puerto Rican birth; denies petitioner and all others similarly situated the equality to which they are entitled under the United States Constitution; and violates the solemn undertaking made by the United States under the Jones Act, under the Treaty of Paris, under the United Nations Charter and under the specific commitment made by the United States to the United Nations in 1953; all of which is more fully set forth in our Jurisdictional Statement and need not be repeated here.

It is submitted that neither the assertion of *stare decisis* founded upon case law which has, over the past six years of fast development, become outmoded, nor adherence to doctrines inimical to the National purpose expressed by our President so recently and against the background of compelling events, should be permitted to stand in the way of review by this Court of the very significant questions upon which the Judges of the New York Court of

Appeals divided sharply and which we have discussed in the Jurisdictional Statement presented to this Court.

The motion to dismiss or affirm should be denied.

November 23, 1965.

Respectfully submitted,

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W. BERNARD RICHLAND,
of Counsel.